

Federal Budget Bills 2012

Implications for Federal Environmental Law

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Canadian
Environmental Law
Association

EQUITY. JUSTICE. HEALTH.

Overview

- Budget Speech and Budget Plan 2012 with updates to 2013
- Omnibus Bill C-38 – Amendments to CEAA and Fisheries Act
- Omnibus Bill C-45 – Amendments to the Navigable Waters Protection Act
- Omnibus Bill C-4 (2013) – Minor updates

Budget Speech 2012

- Finance Minister's Budget Speech March 29, 2012, set out a series of measures under the title "Responsible Resource Development"; a theme which continued through that year's budget process & subsequent implementation bills
- He stated that "The Government is committed to reforming the regulatory system in the resource sector so that reviews are conducted in a timely and transparent manner, while safeguarding the environment"

Budget Speech 2013

- The theme of ``Responsible Resource Development`` was not front and centre in the 2013 budget speech although the speech did reiterate the steps taken the prior year
- Budget 2013 contained some minor fisheries habitat, marine conservation and clean energy generation announcements as well as provisions incenting junior mineral exploration, and sustainable aquaculture among others, relevant to the issues of resources.
- It also established the Mackenzie Gas Projects Impact Fund, to fund regional projects to mitigate socioeconomic impacts in that region from the Mackenzie gas projects.

Budget Speech

- The balance of my comments focus on the 2012 amendments which affected environmental assessment, fisheries and navigable waters.
- Budget Speech 2012 said government would
 - bring forward legislation to achieve the goal of “one project, one review”
 - improve and make new investments in regulatory review, streamline the review process for major economic projects, strengthen pipeline and marine safety, support Aboriginal consultations
 - strengthen the Major Projects Management Office
 - “ensure the safety and security of Canadians and the environment as energy resources are developed”

Budget Plan 2012

- The government's Budget Plan, also tabled March 29, provided 489 pages of text describing the measures to be taken
- Included measures such as \$165 million over two years for responsible resource development; \$12.3 million for diamond exploration in the north; more access to seismic technology for offshore exploration
- \$10.5 million for fisheries science

Budget Plan 2012 cont'd

- The pipeline and marine safety initiative (\$35.7 million over two years) included issues around double hulls, piloting, tanker inspection, improved navigational products (charts)
- There was also a plan to revisit the legislative framework related to oil spills and emergency response (which we have been calling for, but this has not happened yet)
- In addition, another \$13.5 million over two years to the NEB was meant to increase pipeline inspections (cost recovered)

Bill C-38, 2012 Federal Budget Implementation Bill

- The next level of detail was provided by the legislation introduced to implement the Budget
- A 431 page Bill introduced or amended many diverse pieces of legislation – thus styled an “omnibus” Bill
- Environmental community, including CELA objected to the use of the Budget bill to substantively amend environmental statutes
- We called on government to deal with those proposals by separate legislation with normal process of study and input
- (It should be noted that budget Bill 2013 (Bill C-4) received first reading in October 2013 and again took the format of a highly criticized “omnibus” bill.)

Bill C-38 – The 2012 Budget Bill

- Bill C-38 repealed the Kyoto Protocol Implementation Act (although this had not been mentioned in the 2012 Budget Speech nor Budget Plan)
- The Fisheries Act was substantially amended (also not mentioned in the Budget Speech or the Budget Plan on March 29, 2012)
- It narrowed the protection of the Fisheries Act to protection of fish that support “significant aboriginal, recreational or commercial fisheries”

Bill C-38 2012 - Contents

- Specific provisions to implement the plans to have major energy projects approvals streamlined included giving the NEB authority over navigable waters in relation to pipeline crossing approvals as I will review further below
- The Bill gave the federal Cabinet the power to make final decisions on major pipelines and sets out the authority for the Minister and the NEB Chairperson to establish the timelines for regulatory reviews under the NEB Act

Bill C-38 Contents cont'd

- Rather than amending the Canadian Environmental Assessment Act, the Budget (surprisingly) repealed the Act entirely and replaced it with a new version
- The new CEAA limits its purpose to protection of the components of the environment that are “within the legislative authority of parliament”
- It also adds as a purpose “to ensure the completion of EA in a timely manner”

Bill C-38 – Contents cont'd (CEAA)

- The environmental effects to be taken into account include changes or significant effects on items “within the legislative authority of Parliament”:
 - “Fish” and “fish habitat” (new definitions) are imported from the revised *Fisheries Act*
 - Migratory birds,
 - Species at risk
 - Federal lands
 - Inter-provincial effects
 - International effects

Bill C-38 cont'd

- CEAA environmental effects also include,
“(c) *with respect to aboriginal peoples, an effect* occurring in Canada of any change that may be caused to the environment on
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes, or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.”

Bill C-38

- Environmental effects beyond these, but directly linked to a federal authority's exercise of its power are also to be taken into account (for example, changes to the environment, health and socio-economic conditions, physical or cultural heritage, or sites of architectural and historical significance)
- Cabinet can exempt a component of the environment from the application of the Act by Order

Bill C-38 contents cont'd (CEAA)

- Authority was provided to recognize provincial EAs as “equivalent”, to be conducted under their provincial EA legislation on request of a province – this would supplant the federal EA in such a case
- There are limits in the Act to doing so – the Minister has to be satisfied as to the substantive and procedural procedures under the provincial process meeting section 19 CEAA factors and meeting certain public participation thresholds

Bill C-38 Contents (CEAA) cont'd

- Minister may refer an EA to a Review Panel (with a maximum combined 24 month time line)
- However Minister cannot make a referral if the responsible authority is the CNSC or the NEB

Bill C-38 – Fisheries Act Contents

- Bill provided a new definition of “Serious harm to fish” - the death of fish or any permanent alteration to, or destruction of, fish habitat
- The revised Fisheries Act would limit the protection of fish habitat to this definition, rather than as per the previous provision which prohibited harmful alternation or disruption of fish habitat, regardless of whether long or short term in nature

Bill C-38 – Fisheries Act

- Other changes included in the bill will provide that activities to be listed in regulation will be exempted from the revised provisions; thus exempting them from permit requirements and federal oversight
- Cabinet is also empowered under the revised Bill to order or list provisions of the Act or regulations that do not apply in a province on the basis that that province has a provision “equivalent in effect” – this is puzzling since fisheries is a listed matter of federal jurisdiction
- The latest regulations (in force November 25 2013) and policy documents on the new provisions of the *Fisheries Act* are found at [http://www.dfo-mpo.gc.ca/habitat/changes-](http://www.dfo-mpo.gc.ca/habitat/changes-changements/index-eng.htm)

[changements/index-eng.htm](http://www.dfo-mpo.gc.ca/habitat/changes-changements/index-eng.htm)

EA Implications of Bill C-38

- Thousands of fewer Environmental Assessments (screening or otherwise) under federal Environmental Assessment
- The latest regulations setting out the physical activities that are subject to CEAA were published November 6 2013:
<http://www.ceaa.gc.ca/default.asp?lang=en&xml=0DDF9560-6A8A-4403-B33A-B906AC6A1D93>
- The new regulations omit many environmentally significant activities (i.e. metal smelters, pulp and paper mills, certain mining operations, nuclear power plant refurbishment etc.) which were previously potentially caught by the statutory EA triggers under CEAA 1992

EA Implications of Bill C-38 cont`d

- Reduction of the number of federal agencies and departments conducting Federal EAs to three (the Canadian Environmental Assessment Agency (CEAA); the National Energy Board (NEB); and the Canadian Nuclear Safety Commission (CNSC) or in some cases another federal authority that holds hearings and is designated by Order or regulations

EA Implications cont'd

- Set timelines for completion of EAs for projects (i.e. those remaining subject to Federal EA), regardless of complexity and availability or lack of critical information
 - Panel reviews 24 months
 - NEB hearings 18 months
 - “Standard” EAs 12 months (365 days from Notice of commencement; max 3 month extension; info requests not counted in the time)

EA Implications cont'd

- Greatly increased reliance on narrowly focussed regulatory agencies in the energy sector, despite their traditional lack of EA expertise
- Potential to over-politicize the federal EA process at all key decision-making stages
 - Lack of criteria for many decisions such as those for approvals “justified in the circumstances”

EA Implications

- Increased uncertainty (for example, questions as to which projects are to be “designated projects” under the Act)
- Increased discretion to the CEAA Agency as to whether to require EA of non-energy projects at all
- The provisions to allow a provincial EA as “equivalent to” or “an appropriate substitute to” the federal EA are inappropriate given the better, but vastly under-utilized current powers for joint provincial-federal EAs

EA implications cont'd

- Undue narrowing of scope and content of federal EAs by way of the new narrower definition of environmental effects (see above)
- Narrowing of the environmental assessment considerations such as the omission of considering the “need” for the project or “alternatives to” the project

EA Implications cont'd

- Failure to deal with issues that ENGOs and others had noted that did require legislative action such as:
 - Strengthening environmental sustainability considerations
 - Entrenching strategic EA of government policies, programs, plans
 - Improving public participation opportunities
 - Ensuring improved procedural fairness and rigour in review panel proceedings
 - Establishing mechanisms for assessing the cumulative effects of numerous “small” projects

Bill C-45 – Navigable Waters Act

- In a second budget bill, the Federal government also made substantial changes to the Navigable Waters Protection Act, removing most waterways in Canada from its protection (an Ecojustice briefing note puts the figures at 99.7% of Canada's lakes and 99.% of Canada's rivers removed from the Act which is now called the Navigation Protection Act)
- The name of the Act was also changed to the “Navigation Protection Act”
- These amendments are not yet in force (as of November 2013)

Bill C-45 cont

- The prohibition on Works (across or that obstruct etc.) is limited by this Act to those that are placed “in, on, over, under, through or across any navigable water that is listed in the schedule”
- Therefore the schedule listing those navigable waters is key in the new scheme of the Act – to see the Schedule (not yet in force as of November 2013), go to <http://laws-lois.justice.gc.ca/eng/acts/N-22/nifnev.html>
- The assessment as to whether to grant a permit for a Work will be limited to factors affecting navigation

Bill C-45 cont

- The rationale for the choices of the waterways listed on the schedule is set out in the Transport Canada website as those waterways “most actively used”. It stated in addition:
 - At least part of the waterway must be supporting heavy commercial and/or recreational navigation activity;
 - Only the portions that are actively being used are listed as a waterway; and
 - Waters are accessible by ports and marinas in proximity to heavily populated areas.

Bill C-45

- There is provision in the Act for other waterways to be added to the schedule in the future on grounds such as public interest or request of a local authority
- Transport Canada's website indicates that the government expects all other navigation issues on other waterways to be resolved through the common law (under principles such as trespass, nuisance and negligence)
- This would entail applications to the Courts in cases where disputes could not be resolved

Bill C-45

- Other amendments in Bill C-45 to the National Energy Board Act and Canada Oil and Gas Operations Act continue the provisions that pipelines are not works to which the Navigation Protection Act applies
- Similarly, the Navigation Protection Act does not apply to interprovincial power-lines nor to international power lines

Bill C-45 cont'd

- Instead, the scheme is that the National Energy Board will consider issuance of permits to construct pipelines and power lines that fall under its jurisdiction and will provide any provisions relating to water crossings in those approvals
- The National Energy Board this month (November 2013) has issued a consultation document on damage prevention for pipeline crossings for those engaged in construction or excavation near pipeline crossings of waterways:

<http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/dmgprvntnrgltn/ntcprpsdchngsdmgprvntnrgltn-dgn-eng.html>

Bill C-45 cont'd

- Provisions relating to requirements for railways and bridges under other legislation are to be taken to be additional to the requirements of the Navigation Protection Act
- The Department of Transport issued a Draft Minor Works Order Discussion paper this past August 2013:
<http://www.tc.gc.ca/eng/marinesafety/oep-nwpp-menu-4318.html>
- There are additional provisions in the Act that would continue to apply to all navigable waters - not only those waterways listed in the Schedule – for example, prohibitions against dumping and dewatering would apply broadly

CELA Blog on one year anniversary of CEAA 2012 – www.cela.ca

The screenshot shows a web browser window with the address bar displaying www.cela.ca/blog/2013-06-25/ceaa-1992-in-memori-1. The page features the CELA logo (a stylized 'C' with a leaf, 'e' with a sun, 'L' with a house, and 'a' with a water drop) and the text "Canadian Environmental Law Association EQUITY. JUSTICE. HEALTH.". A navigation menu includes links for HOME, ABOUT CELA, BLOG, E-BULLETIN, FRANÇAIS, LIBRARY, and CONTACT US. The main content area is titled "Blog" and features a post titled "CEAA 1992: In Memoriam" by Richard D. Lindgren, dated June 25, 2013. The post text discusses the anniversary of the Canadian Environmental Assessment Act, 1992 (CEAA 1992) and its impact on environmentalists and decision-makers. A sidebar on the left lists various categories such as News, Publications, and CEAA in the Courts. A sidebar on the right lists Collections, including the Canadian Environmental Assessment Act. The Windows taskbar at the bottom shows the date and time as 3:39 PM on 19/11/2013.

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Blog

CEAA 1992: In Memoriam

Posted by *Richard D. Lindgren, CELA Counsel on June 25, 2013*

On the first anniversary of its untimely demise on July 6, 2012, the *Canadian Environmental Assessment Act, 1992 (CEAA 1992)* is being remembered by environmentalists as an important attempt to impose legally binding environmental assessment (EA) obligations upon federal decision-makers across Canada.

During its 20 years of existence, **CEAA 1992** espoused an overall objective of sustainable development. To achieve this public interest goal, CEAA 1992 required federal agencies, tribunals and commissions to take a hard long look at the ecological and socio-economic impacts of projects before deciding whether federal funds, lands, or permits should be provided to enable such projects to proceed.

Information-gathering and decision-making under CEAA 1992 was intended to occur in an efficient, robust and public manner, although it sometimes became necessary for environmental groups to go to court to ensure governmental compliance with these legal requirements.

Given the implementation track record under CEAA 1992, most observers agreed that there was room for improvement in the statute, particularly in relation to

Collections

Canadian Environmental Assessment Act

Collection of materials about CEAA and CEAA reform

3:39 PM
19/11/2013

The screenshot shows a web browser displaying the homepage of the Canadian Environmental Law Association (CELA). The browser's address bar shows the URL <http://www.cela.ca/>. The page features the CELA logo, which consists of four icons: a red leaf with a white 'C', a yellow sun with a white 'e', a green house with a white 'L', and a blue water drop with a white 'a'. To the right of the logo, the text reads "Canadian Environmental Law Association" in a large, bold, brown font, with the tagline "EQUITY. JUSTICE. HEALTH." below it. A search bar and a "Subscribe to our mailing list" form are located in the top right corner. Below the logo and text, there is a navigation menu with links for "HOME", "ABOUT CELA", "E-BULLETIN", "FRANÇAIS", "LIBRARY", and "CONTACT US". The main content area is divided into three columns. The left column contains a list of links: "News", "Publications", "Our Services", "Frequently Asked Questions", "CELA in the Courts", "Access to Environmental Justice". The middle column contains a paragraph of text: "CELA works to protect human health and our environment by seeking justice for those harmed by pollution and by working to change policies to prevent such problems in the first place. For 40 years, CELA has used legal tools to increase environmental protection and safeguard communities. As a **Legal Aid Clinic**, our top priority is to represent low income individuals and communities and to speak out for those with less influence and who receive less of a say in decision-making." Below this paragraph is another paragraph: "Through **landmark legal cases** CELA has helped shape government and industry approaches to pollution and other environmental threats and has forced polluters to clean up their act. CELA has also been part of shaping **innovative collaborations** to improve sustainability and human health including the Low Income Energy Network, the". The right column contains a section titled "CELA's Lawyer Referral List" and a sub-section titled "News and Events" with a date "Sep 18 2012" and a list of news items: "Bi-national Great Lakes Citizen Coalition Calls on US Agency Not to Remove Niagara-area Hazardous Waste Site From Superfund". The browser window also shows several open tabs, including "CELA Powerpoint Te...", "Windows Screen Sho...", and "Featured Items a...". The browser's user interface includes a search bar, a "Share" button, and a user profile dropdown menu.



Canadian Environmental Law Association

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